EFiled: Mar 24 2016 12:06PM EDT
Transaction ID 58765692
Case No. 5421-JJ

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

UNDERWRITERS AT LLOYD'S, LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES,	)	
Plaintiffs,	)	
v.	)	No. 5421-JJ
DYNCORP, DYNCORP INTERNATIONAL LLC, DYNCORP TECHNICAL SERVICES, LLC N/K/A CSC APPLIED TECHNOLOGIES, LLC, and DYNCORP AEROSPACE OPERATIONS LLC,	)	(Coordinated with Del. Ch. No. 4336-JJ & Del. Super. C.A. No. 08C-09-218 JRJ)
Defendants.	)	

OPINION

Date Submitted: December 22, 2015
Date Decided: March 24, 2016

Upon Defendants' Motion for Summary Judgment or Alternatively for Partial Summary Judgments and for a Stay: **DENIED in part, and DEFERRED in part.**

Thaddeus J. Weaver, Esquire, Dilworth Paxson, LLP, Wilmington, DE, Ann C. Taylor, Esquire (*pro hac vice*) (argued), T. Patrick Byrnes, Esquire (*pro hac vice*), and Mark A. Deptula, Esquire (*pro hac vice*), Locke Lord LLP, Chicago, IL, Attorneys for Plaintiffs.

David Baldwin, Esquire, and John Sensing, Esquire, Potter Anderson & Corroon, LLP, Wilmington, DE, Finley T. Harckham, Esquire (*pro hac vice*) (argued), and Kanishka Agarwala, Esquire (*pro hac vice*), Anderson Kill, P.C., New York, NY, Alexander D. Hardiman, Esquire (*pro hac vice*), Pillsbury Winthrop Shaw Pittman LLP, New York, NY, Attorneys for Defendants.

Jurden, P.J.[1]

[1] Sitting by designation as Vice Chancellor under Del. Const. art. IV, § 13(2). June 9, 2010 Order of the Supreme Court of Delaware (Trans. ID. 31558865).

I. INTRODUCTION

This matter involves three separate but related cases concerning aviation liability insurance policies (the "Policies") issued to DynCorp, DynCorp International LLC, DynCorp Technical Services, LLC n/k/a CSC Applied Technologies LLC, and DynCorp Aerospace Operations LLC (collectively "DynCorp").[2]

In September 2008, DynCorp filed a breach of contract and declaratory judgment suit against Certain Underwriters at Lloyd's, London, Certain London Market Insurers, and Does 3–20 (collectively "Underwriters")[3] in the Superior Court of Delaware (the "Superior Court Action"). In the Superior Court Action, DynCorp seeks defense and indemnity under the Policies for a series of underlying tort lawsuits arising out of DynCorp's aerial spraying of herbicide in South America.[4]

In February 2009, Underwriters filed an action in the Delaware Court of Chancery against DynCorp International LLC ("DI"), seeking rescission, or in the alterative, reformation, of insurance policies in effect from May 1, 2006 to

---

[2] C.A. No. 08C-09-218 JRJ ("Superior Court Action"); C.A. No. 4336-JJ ("Rescission Action"); C.A. No. 5421-JJ ("Reformation Action").

[3] "Underwriters" in the Reformation Action are listed in Exhibit A of the Second Amended Complaint. Reformation Action Second Amended Complaint ("Reformation Action SAC") (Trans. ID. 57388804).

[4] Superior Court Action Complaint ¶¶ 17–22 (Trans. ID. 21638764).

February 1, 2009.[5]

On November 9, 2009, the Superior Court granted DynCorp's Motion for Partial Summary Judgment on the issue of Underwriters' duty to defend.[6] Thereafter, Underwriters filed the instant action in the Delaware Court of Chancery seeking to reform the policies in effect from December 31, 1998 to December 31, 2003 (the "1998–2003 Policies") (the "Reformation Action").[7]

Before the Court is DynCorp's Motion for Summary Judgment or Alternatively for Partial Summary Judgments and for a Stay in the Reformation Action.[8]

II. BACKGROUND

A. DynCorp's Aerial Spraying Operations in South America

In 1991, the United States Department of State (the "DOS") Bureau of

---

[5] Rescission Action Second Amended Complaint (Trans. ID. 56886130); *see also* April 20, 2009 Order of the Supreme Court of Delaware (Trans. ID. 24873540) (designating Superior Court Judge Jan R. Jurden to sit as Vice Chancellor for the Rescission Action). The Rescission Action is "based upon DI's alleged failure to disclose, and alleged misrepresentations of, material information when it sought an amendment to the 2006 policy to remove an Aerial Application Exclusion, and when it twice renewed the policy with the exclusion removed." Rule 16(c) Pretrial Stipulation at 7 ("Pretrial Stip.") (Trans. ID. 57502899).

[6] *DynCorp v. Certain Underwriters at Lloyd's, London*, 2009 WL 3764971, at *4 (Del. Super. Nov. 9, 2009).

[7] The policies at issue in the Reformation Action are numbered ACA1194, ADA1194, AEA1194, AFA1194, and AGA1194. Reformation Action SAC ¶¶ 31–36, 42–46.

[8] Opening Brief in Support of Defendants' Motion for Summary Judgment or Alternatively for Partial Summary Judgment and for a Stay ("DynCorp Mot. Summ. J.") (Trans. ID. 56843864); Underwriters' Response to Defendants' Motion for Summary Judgment or Alternatively for Partial Summary Judgment and for a Stay in the Reformation Action ("Underwriters Resp.") (Trans. ID. 57005776); Reply Brief in Further Support of Defendants' Motion for Summary Judgment or Alternatively for Partial Summary Judgment and a Stay (Trans. ID. 57087533).

International Narcotics and Law Enforcement awarded DynCorp a contract to support drug eradication efforts in South America.[9] In 1998 and 2005, the DOS entered into substantially similar contracts with DynCorp's subsidiaries, DynCorp Aerospace Technology and DI (collectively the "INL Contract").[10] Pursuant to the INL Contract, DynCorp performed a number of services for the DOS, including the aerial spraying of chemicals in Columbia to eradicate drug crops.[11]

B. DynCorp's Aviation Insurance Polices

From at least the late 1980s, DynCorp placed its aviation insurance risks in the London insurance market.[12] DynCorp retained brokers located in the United States and London, England, to negotiate the terms, conditions, and exclusions of aviation insurance coverage on its behalf.[13] "Underwriters" are "certain underwriters at Lloyd's of London and certain companies doing business in the London insurance market."[14]

From December 1993 to 2003, DynCorp retained Willis of Boston and Willis Corroon Aerospace London (collectively "Willis")[15] to procure insurance

---

[9] Pretrial Stip., Ex. 1 ¶ 2 ("Admitted Facts").
[10] Admitted Facts ¶¶ 4–12. For the time period relevant to this decision, DI was a subsidiary of DynCorp. *Id.* ¶¶ 6–9.
[11] *Id.* ¶ 3.
[12] Admitted Facts ¶ 15.
[13] Reformation Action SAC ¶ 15.
[14] Pretrial Stip. at 4 n.1. "The London insurance market is not an insurer, but a marketplace where individual insurers operate and insure risks." Admitted Facts ¶ 16.
[15] Reformation Action SAC ¶ 15; Underwriters Resp. at 4–7; Underwriters Resp., Ex. 5 Deposition Transcript of Carol Ottaviani at 51:23–52:13.

coverage for its aviation risks, including insurance for its INL Contract operations.[16] At first, DynCorp insured its aviation risks for the INL Contract separately from its other aviation risks.[17] But in 1993, DynCorp added its aviation liability for the INL Contract to its preexisting aviation liability policy, Policy No. 459232400.[18]

The "slip" evidencing the addition of the INL Contract operations stated that "global and Associates and/or East Inc." would be included "as additional named Insureds" and provided on a separate line, "Liability excluding Chemical."[19] Thereafter, Endorsement No. 3 to Policy No. 459232400, effective August 1, 1993, provided the full wording for the INL Contract coverage.[20] Endorsement No. 3 to Policy No. 459232400 states:

> In respect of the IN[L] Contract
> (a) the following are included in this Policy.
> (i) as additional Named Assureds Global and Associates and/or East Inc.
> . . .

---

[16] Underwriters Resp., Ex. 9 June 3, 1993 Letter from DynCorp to Willis; Underwriters Resp., Ex. 14 December 6, 1993 Letter from Dyncorp Re: Brokers' Letter of Authorization.

[17] Underwriters Resp. at 3, Ex. 3 Bain Clarkson Slip (evidencing issuance of aircraft liability insurance).

[18] Admitted Facts ¶¶ 19–21; Underwriters Resp., Ex. 7 Policy No. 459232400; Underwriters Resp., Ex. 10 Policy No. 459232400 INL Contract Slip Endorsement; Underwriters Resp., Ex. 13 Endorsement No. 3 to Policy No. 459232400 ("Endorsement No. 3").

[19] Underwriters Resp., Ex. 10 Policy No. 459232400 INL Contract Slip Endorsement; Admitted Facts ¶ 20. As described by Underwriters, a "placement slip" is a document that is "finalized by the London broker and agreed by the Lead Underwriter" and "summarizes the essential terms and premium of the agreed insurance contract." Pretrial Stip., Ex. 2 ¶ 10. For all of the 1998–2003 Policies a "slip" was agreed upon between Underwriters and DynCorp. Admitted Facts ¶ 30.

[20] Endorsement No. 3; Admitted Facts ¶ 21.

> (d) This policy does not cover liability for Bodily Injury or Property Damage directly or indirectly caused by or in consequence of the use of chemicals, dusting powders, seeds, fertilisers and compounds.[21]

During this time, Global Aerospace Underwritings Managers Limited ("Global Aerospace"), the lead Underwriter on DynCorp's aviation insurance policies, began working with Willis to draft the policy wording for the next policy period.[22] Based on the slip provision "Excluding chemical liability" for Policy No. A6A1194,[23] Willis sent Tony Towns, the deputy manager of the policy department for Global Aerospace, a draft policy that stated, in relevant part:

> With respect to the IN[L] Contract, Global and Associates and/or East Inc. are added as additional Insureds. However, this Endorsement shall not apply in respect of liability for Bodily Injury or Property Damage caused directly by drifting compounds and/or seeds and/or pesticides dropped sprayed or emitted intentionally or otherwise.[24]

Although Willis and Global Aerospace began drafting Policy A6A1194, the process took some time, and Policy A6A1194, effective December 31, 1993 to December 31, 1994, incorporated the same wording as Endorsement No. 3 to the expiring Policy No. 459232400.[25] The policy wording proposed by Willis appears

---

[21] Endorsement No. 3; Admitted Facts ¶ 21.
[22] Underwriters Resp., Ex. 19 Policy No. A6A1194 Slip; Underwriters Resp., Ex. 21 Policy No. A6A1194 Draft Wording.
[23] Underwriters Resp., Ex. 19 Policy No. A6A1194 Slip; Underwriters Resp., Ex. 21 Policy No. A6A1194 Draft Wording.
[24] Underwriters Resp., Ex. 21 Policy No. A6A1194 Draft Wording.
[25] Admitted Facts ¶¶ 21, 32 ("This policy does not cover liability for Bodily Injury or Property Damage directly or indirectly caused by or in consequence of the use of chemicals, dusting powders, seeds, fertilisers and compounds."); Underwriters Resp., Ex. 23 Deposition of Tony Towns at 57:17–58:9 (testifying that the wording was not ready in time).

in the slip for Policy A7A1194, which was to take effect the next policy period, from December 31, 1994 to December 31, 1995.[26] Although Policy A7A1194's wording is similar to the slip, it is not identical.[27] Policy A7A1194 states:

> With respect to the IN[L] Contract, Global and Associates or East Inc. are added to the Insureds named in Schedule A. However, this Policy shall not apply in respect of liability for Bodily Injury or Property Damage caused directly by drifting compounds or seeds or pesticides dropped sprayed or emitted intentionally or otherwise . . . .[28]

Ultimately, this policy wording appeared with minor variations in subsequent slips and policies, including the 1998–2003 Policies, which are the subject of the Reformation Action.[29]

C. The Underlying Actions

As a result of DynCorp's spraying operations under the INL Contract, a series of tort lawsuits were filed against DynCorp ("Underlying Actions").[30] The first action, *Arias v. DynCorp* ("*Arias*"), was filed on September 11, 2001, in the United States District Court for the District of Columbia.[31] Among other things,

---

[26] Admitted Facts ¶ 32.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] The Underlying Actions consist of five lawsuits: (1) *Arias et al. v. DynCorp, et al.*, filed September 11, 2001; (2) *Quinteros, et al. v. DynCorp Aerospace Operations LLC, et al.*, filed November 22, 2006; (3) *Province of Sucumbios, Republic of Ecuador v. DynCorp Aerospace Operations LLC et al.*, filed December 27, 2006; (4) *Province of Esmeraldas of Ecuador v. DynCorp Aerospace Operations LLC et al.*, filed March 5, 2007; and (5) *Province of Carchi of Ecuador v. DynCorp Aerospace Operations LLC et al.*, filed April 17, 2007. *DynCorp*, 2009 WL 3764971, at *1 n.5 (listing lawsuits filed against DynCorp); Admitted Facts ¶¶ 45–51.
[31] Admitted Facts ¶ 45.

the *Arias* plaintiffs alleged:

> Pursuant to a contract to conduct aerial spraying over areas of Columbia alleged to be where cocaine and heroin are grown, the DynCorp Defendants utilized a fumigant that is harmful to humans, livestock, and plants other than cocaine or opium poppies . . . [and] the DynCorp Defendants sprayed the toxic herbicide . . . without regard to the health impact . . . and knowing or acting in willful disregard of the fact that winds would carry the toxic spray to areas inhabited by Plaintiffs . . . .[32]

DynCorp notified Underwriters of the *Arias* lawsuit and stated that it was "tender[ing] defense" of *Arias* to Underwriters.[33] Upon verbal confirmation that Underwriters were denying coverage, DynCorp requested that Underwriters issue a written coverage position.[34] On January 9, 2002, Lord Bissell & Brook ("Lord Bissell"), now Locke Lord, acting in the role of a claims administrator for Underwriters, issued a coverage opinion.[35] That opinion provided that no coverage would exist for the *Arias* lawsuit if: (1) DynCorp had an ownership interest in the aircraft used in the spraying operation; or (2) the spraying operation had not been declared to Underwriters.[36]

On July 11, 2002, DynCorp and Underwriters held a teleconference during which Underwriters informed DynCorp that they did not owe DynCorp a duty to

---

[32] DynCorp Mot. Summ. J., Ex. 14 October 1 and October 2, 2001 Correspondence.
[33] *Id.*
[34] *Id.*; DynCorp Mot. Summ. J., Ex. 16 November 14, 2001 Letter from Mendes & Mount to Underwriters.
[35] DynCorp Mot. Summ. J., Ex. 17 January 9, 2002 Letter from Lord Bissel to Global Aerospace Underwriting.
[36] *Id.*

defend in the Underlying Actions because the Policies excluded coverage for "Bodily Injury or Property Damage caused directly by drifting compounds or seeds or pesticides dropped sprayed or emitted intentionally or otherwise" (the "Aerial Application Exclusion").[37] In response, DynCorp argued that the Aerial Application Exclusion applied only to DynCorp's subcontractors, not to DynCorp.[38]

On September 23, 2002, Lord Bissel notified DynCorp that Underwriters would not defend or indemnify DynCorp in the *Arias* lawsuit.[39] Lord Bissel stated that it "undertook an investigation of the underwriting history of [the Aerial Application Exclusion]" and concluded that the Aerial Application Exclusion applied to DynCorp.[40] Finally, Lord Bissel stated that any defense or indemnity obligation was also precluded by the Policies' exclusion for claims directly or indirectly occasioned by "pollution and contamination of any kind whatsoever" (the "Pollution Exclusion").[41]

D. The Superior Court Action

In 2008, DynCorp moved for partial summary judgment in the Superior

---

[37] DynCorp Mot. Summ. J., Ex. 20 July 17, 2002 Letter from DynCorp to Lord Bissel (summarizing July 11, 2002 teleconference).
[38] *Id.*
[39] DynCorp Mot. Summ. J., Ex. 22 September 23, 2002 Letter from Lord Bissel to DynCorp.
[40] *Id.*
[41] *Id.*

Court Action on Underwriters' duty to defend under the Policies.[42] The Superior Court granted DynCorp's Motion for Partial Summary Judgment, finding that the Policies unambiguously provided coverage for bodily injury or property damage arising out of aircraft hazards as long as: (1) the aircraft was not owned in whole or in part by DynCorp; and (2) the use was declared to Underwriters ("Duty to Defend Order").[43] In so holding, the Superior Court explicitly considered Underwriters' argument that the Aerial Application Exclusion precluded coverage for the claims in the Underlying Actions.[44] The Aerial Application Exclusion in the Polices at issue in the Superior Court states:

> [W]ith respect to the INL Contract, EAST Inc. and Global and Associates are included as Additional Named Insureds solely as respects their respective operations under the INL Contract on behalf of DynCorp. However, this insurance shall not apply in respect of liability for Bodily Injury or Property Damage caused directly by drifting compounds or seeds or pesticides dropped sprayed or emitted intentionally or otherwise.[45]

The Superior Court found that the Aerial Application Exclusion applied to EAST Inc. and Global and Associates, DynCorp's subcontractors, but not to DynCorp.[46] This determination was based on the language of the Aerial Application Exclusion

---

[42] *DynCorp*, 2009 WL 3764971, at *1.
[43] *Id.* at *4. The Superior Court's decision was based on the clear and unambiguous terms of the Policies, construing the Policies as a whole. *Id.* at *3 ("[I]t is a fundamental rule that insurance policies must be construed as a whole.") (citing *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001)).
[44] *Id.* at *5.
[45] *DynCorp*, 2009 WL 3764971, at *5.
[46] *Id.*

and on the Policies' exclusion for "Aircraft being used for or in connection with . . . crop dusting, [or] spraying . . . *unless* such use is declared to the Insurers" ("Declared Spraying Provision").[47] The Superior Court noted that it could not reconcile Underwriters' argument that the Aerial Application Exclusion precluded coverage for claims against DynCorp that arise out of the INL Contract spraying operations when the Declared Spraying Provision—as written—explicitly provided coverage so long as the use was declared.[48] The Court also held that DynCorp's spraying operations do not fall within the Pollution Exclusion because coverage for "spraying" is governed by the Declared Spraying Provision and the Aerial Application Exclusion, not the Pollution Exclusion.[49]

E. The Reformation Action

Following the Superior Court's Duty to Defend Order, Underwriters filed the Reformation Action against DynCorp in the Delaware Court of Chancery, seeking to reform the 1998–2003 Polices.[50] Underwriters allege that the parties' intent, agreement, and understanding were to exclude coverage for any liability arising out of the chemicals aerially sprayed under the INL Contract.[51] Because the Superior Court held in the Duty to Defend Order that the Policies do not reflect

[47] *Id.* at *4–5 (emphasis added).
[48] *Id.* at *5.
[49] *Id.*
[50] Reformation Action SAC ¶ 1.
[51] *Id.* ¶ 53.

that alleged understanding, Underwriters seek reformation on the basis of mutual mistake and/or unilateral mistake.[52]

III. STANDARD OF REVIEW

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[53] All facts must be viewed in the light must favorable to the non-moving party, and all reasonable inferences must be made in favor of the non-moving party.[54]

On a reformation claim, "the trial court must determine whether the plaintiffs on the summary judgment record proffered evidence from which any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence."[55] Evidence adduced on the summary judgment record may not be weighed qualitatively or quantitatively, and "[i]f the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate."[56]

---

[52] 27 Williston on Contracts § 70:21 (4th ed.) ("If the parties are mistaken with respect to the legal effect of the language that they have used, the writing may be reformed to reflect the intended effect.").
[53] Ct. Ch. R. 56(c).
[54] *Lions Gate Entm't Corp. v. Image Entm't Inc.*, 2006 WL 4782450, at *4 (Del. Ch. June 5, 2006) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).
[55] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)).
[56] *Id.* at 1149–51 ("If a trial court must weigh the evidence to a greater degree than to determine that it is hopelessly inadequate ultimately to sustain the substantive burden, summary judgment

IV. PARTIES' CONTENTIONS

DynCorp argues that Underwriters "have changed their position repeatedly as to what the supposed agreement was," and therefore, Underwriters have so undermined their position that they cannot prove a reformation claim as a matter of law.[57] DynCorp highlights six purported "Coverage Positions" taken by Underwriters at various times, but, the core of DynCorp's "changing positions" argument is the difference between the prayer for relief in Underwriters' First Amended Complaint and Underwriters' Second Amended Complaint.[58] According to DynCorp, Underwriters' Second Amended Complaint in the Reformation Action alleges a new exclusion that is substantially different from what Underwriters previously sought.[59]

---

is inappropriate.").

[57] DynCorp Mot. Summ. J. at 1, 17–21.

[58] According to Underwriters, they amended their Reformation Action Complaint (Trans. ID. 30631619) to "identify more fully the subscribing insurers to the [Policies]." Motion to Amend Complaints ¶ 3 (Trans. ID. 39581568). On June 6, 2015, Underwriters filed a Second Amended Complaint.

[59] In addition to the difference between the prayer for relief in the First Amended Complaint and Second Amended Complaint, DynCorp points to four other purported changed coverage positions. First, Underwriters issued the January 9, 2002 coverage opinion in which Underwriters state that DynCorp would not have coverage: (1) if DynCorp had an ownership interest in the aircraft used in the spraying operations; or (2) if the spraying operations had not been declared to Underwriters. DynCorp Mot. Summ. J. at 7–8 (citing DynCorp Mot. Summ. J, Ex. 17 January 9, 2002 Letter from Lord Bissel to Global Aerospace). Second, Underwriters issued another coverage letter on February 11, 2002, stating that DynCorp had not declared the INL spraying operations to Underwriters, and, therefore, DynCorp did not have coverage for *Arias*. *Id.* at 8 (citing DynCorp Mot. Summ. J, Ex. 19 February 11, 2002 Letter from Lord Bissel to Global Aerospace). Third, during the July 11, 2002 teleconference, Underwriters took the position that the Aerial Application Exclusion applied to DynCorp. *Id.* at 8–9 (citing DynCorp Mot. Summ. J, Ex. 20 July 17, 2002 Letter from DynCorp to Lord Bissel). Fourth, on September 23, 2002, Underwriters wrote a follow up coverage opinion in which Underwriters reiterated

In Underwriters' First Amended Complaint, Underwriters' prayer for relief requests that the Policies be reformed to exclude "liability for Bodily Injury or Property Damage caused directly by drifting compounds . . . ."[60] In Underwriters' Second Amended Complaint, their prayer for relief requests that the Policies be reformed to read: "WITH RESPECT TO ALL HAZARDS INSURED HEREON This Policy shall not apply in respect of liability for Bodily Injury or Property Damage caused directly *or indirectly* by directing compounds . . . ."[61] DynCorp argues that Underwriters' amendments to their prayer for relief render Underwriters incapable of proving their reformation claims as a matter of law.[62]

DynCorp also argues that Underwriters' reformation claims must fail as a matter of law because it would "create an irreconcilable conflict in the 1998–2003 Policies."[63] According to DynCorp, a reformed Aerial Application Exclusion would fatally conflict with the "already interpreted" Declared Spraying Provision.[64]

In the alternative, DynCorp argues that partial summary judgment should be

---

their position that the Aerial Application Exclusion applied to DynCorp and also asserted that the Pollution Exclusion precluded coverage the *Arias* litigation. *Id.* at 9 (citing DynCorp Mot. Summ. J, Ex. 22 September 23, 2002 Letter from Lord Bissel to DynCorp).

[60] Reformation Action First Amended Complaint (Trans. ID. 39872680).

[61] Reformation Action SAC (emphasis added).

[62] DynCorp Mot. Summ. J. at 2–3.

[63] *Id.* at 22–25.

[64] *Id.*

granted on the issue of Underwriters' duty to defend.[65] DynCorp maintains that, even if Underwriters prevail on its reformation claims, Underwriters would still be obligated to defend DynCorp because the surviving intentional infliction of emotional distress ("IIED") claims in the *Arias* litigation would not be excluded from coverage.[66]

In response to DynCorp's assertion that Underwriters have fatally undermined their reformation claims by "changing positions," Underwriters contend that they have "consistently asserted throughout this litigation the same prior specific agreement of the parties—that the policies at issue were not intended to provide coverage for any liability arising out of the intentional spraying of chemicals from aircraft under the INL contract."[67] The evidence, Underwriters argue, will clearly and convincingly establish that Underwriters and DynCorp agreed to insure "aircraft liability (liability from abnormal aircraft operations such as crashes) for the INL Contract . . . [but not] chemical liability (liability from the

---

[65] While litigation between Underwriters and DynCorp proceeded in Delaware, the United States District Court for the District of Columbia dismissed all of the remaining claims in the *Arias* litigation. *Arias v. DynCorp*, 752 F.3d 1011, 1013–14 (D.C. 2014). The plaintiffs appealed, and the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court except for the dismissal of the plaintiffs' battery, nuisance, and intentional infliction of emotional distress claims. *Id.* at 1017–18. Many of the claims in *Arias* were dismissed for lack of expert testimony to establish causation, but the Court of Appeals found that the plaintiffs' battery, nuisance, and IIED claims should not be dismissed because those claims did not require expert testimony. *Id.*

[66] DynCorp Mot. Summ. J. at 25–39.

[67] Underwriters Resp. at 23 (emphasis in original).

intentional spraying of chemicals from aircraft)."[68]

In response to DynCorp's alternative motion for partial summary judgment, Underwriters argue that DynCorp should be judicially estopped from arguing that Underwriters would have a continuing duty to defend if Underwriters successfully proves their reformation claims.[69] Underwriters also argue that the Policies, if reformed, would preclude coverage for any of the remaining *Arias* claims because it is "abundantly clear, [that] the gravamen of the underlying plaintiffs' allegations with respect to the remaining causes of action . . . are that they suffered damages as a result of DynCorp's spraying of toxic chemicals from aircraft."[70]

V. DISCUSSION

A. DynCorp's Summary Judgment Motion

"It is a basic principle of equity that the Court of Chancery has jurisdiction to reform a document to make it conform to the original intent of the parties."[71] Two doctrines allow for reformation: mutual mistake and unilateral mistake.[72] The doctrine of mutual mistake requires the plaintiff to "show that both parties were mistaken as to a material portion of the written agreement."[73] The doctrine of unilateral mistake requires the plaintiff to "show that it was mistaken *and* that the

---

[68] *Id.* at 4–8.
[69] *Id.* at 30–33.
[70] *Id.* at 41–50.
[71] *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990) (citing *Douglas v. Thrasher*, 489 A.2d 422, 426 (Del. 1985)).
[72] *Cerberus*, 794 A.2d at 1151 (citing *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980)).
[73] *Id.*

other party knew of the mistake but remained silent."[74]

"Regardless of which doctrine is used, the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement."[75] Clear and convincing evidence of a specific prior understanding "provides a comparative standard that tells the Court of Chancery 'exactly what terms to insert in the contract rather than being put in the position of creating a contract for the parties.'"[76]

To prevail on a reformation claim, Underwriters must show that: (1) Underwriters thought that the Policies excluded any liability arising out of the chemicals aerially sprayed pursuant to the INL Contract; (2) either that DynCorp was also similarly mistaken, or that DynCorp knew of Underwriters' mistake and remained silent; and (3) that Underwriters and DynCorp had specifically agreed that the Policies would exclude liability arising out of the chemicals aerially sprayed pursuant to the INL Contract.[77]

1. Underwriters' Amendments to Their Prayer for Relief do not Preclude Their Reformation Claims as a Matter of Law

According to DynCorp, the fact that Underwriters have repeatedly changed their position as to what the terms of the purported prior agreement are,

---

[74] *Id.* (emphasis added).
[75] *Id.* (citing *Hob Tea Room, Inc. v. Miller*, 89 A.2d 851, 857 (Del. 1952)).
[76] *Id.* at 1152 (quoting *Collins*, 418 A.2d at 1002).
[77] *Id.*

demonstrates that Underwriters, themselves, do not know what their own purported intent was with respect to the key provision they seek to reform.[78] DynCorp relies on *Lions Gate Entertainment Corp. v. Image Entertainment, Inc.*,[79] to support this argument. In *Lions Gate*, the Court held that by arguing two "quite different understandings," the party seeking reformation had undermined its ability to establish a specific prior understanding that the contract intended, but failed, to express.[80]

The instant case is distinguishable from *Lions Gate*. Since the filing of the Superior Court Action, Underwriters have asserted that the Policies were understood to cover "aviation liability," but not "chemical liability."[81] Moreover, in the context of the Reformation Action, Underwriters have vehemently and consistently asserted the same "prior specific understanding"—that the Policy

---

[78] DynCorp Mot. Summ. J. at 20–21.
[79] 2006 WL 4782450 (Del. Ch. June 5, 2006).
[80] *Id.* at *9.
[81] For example, in Underwriters' response to DynCorp's Motion for Partial Summary Judgment on Underwriters' duty to defend in the Superior Court Action, Underwriters argued: "[I]t is clear that no coverage was afforded for any potential liability caused by the exposure to the chemicals being aerially applied to eradicate drug crops under the INL Contract. Underwriters afforded coverage for EAST, Inc. and Global and Associates for aircraft incidents, such as damages arising from crashes, when the aircraft are being used in high-risk, low-altitude spraying operations." Underwriters' Response to Plaintiffs' Motions for Summary Judgment on the Duty to Defend (Trans. ID. 25216671). *See also* Superior Court Action Underwriters' Answer and Affirmative Defenses at 9 (Trans. ID. 22719989) ("Plaintiffs' claims are barred under certain of the insurance contracts at issue because they exclude claims arising out of the aerial application or drift of any chemical or compound."); Transcript of Superior Court Action June 15, 2009 Oral Argument at 64:10–65:6 (Trans. ID. 26310029) (Underwriters explain that an aircraft conducting crop dusting and spraying could be covered under an "aviation liability policy" if it is declared, but the coverage extends only to incidents arising out of the operation of the aircraft—like crashes—but not liability arising from the spraying itself).

would exclude coverage "for any liability arising out of the chemicals aerially sprayed pursuant to the INL Contract."[82]

In considering Underwriters' Motion to Amend, the Special Master appointed in this case found:

> Underwriters' proposed language does not in any respect materially change the landscape of this litigation. Since 2002, DynCorp has been on notice that Underwriters interpreted the additional insured provision [the Aerial Application Exclusion] to unambiguously and unequivocally exclude coverage for any liability for all insureds, including DynCorp.[83]

The Special Master also considered whether the amendment would be futile under Rule 12(b)(6) and found that Underwriters' proposed amendments would not change the basis for the reformation claim.[84] DynCorp filed a Notice of Exceptions, and the Court, upon *de novo* review, affirmed the Special Master's well reasoned decision that Underwriters' Motion to Amend should be granted.[85]

Underwriters have consistently asserted the same prior specific understanding—that the Policies would exclude coverage for any liability arising out of the chemicals aerially sprayed under the INL Contract.[86] On the summary

---

[82] *E.g.*, Reformation Action Compl. ¶¶ 31–36, 42–45 (Trans. ID. 30631619); Reformation Action SAC ¶¶ 32–36, 42–45.
[83] Transcript of January 20, 2015 Special Master Hearing at 48:11–49:8 (Trans. ID. 56763263).
[84] *Id.*
[85] Transcript of May 5, 2015 Pretrial Conference at 40:7–41:6 (Trans. ID. 57301330).
[86] *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *16 (Del. Ch. June 30, 2004) (citing *Hob Tea Room*, 89 A.2d at 856; *James River-Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *9 (Del. Ch. Mar. 6, 1995); *Cerberus*, 794 A.2d at 1152 ("[A]n alleged prior agreement may be informal, oral, [or] not constitutive of a complete contract."); *ASB*

judgment record, Underwriters have not, as DynCorp argues, fatally undermined their ability to prove that Underwriters and DynCorp reached this understanding.

2. Underwriters have Proffered Sufficient Evidence of a Prior Specific Understanding to Survive Summary Judgment

Underwriters argue that summary judgment is not appropriate because there are genuine issues of material fact in dispute concerning whether Underwriters can prove a prior intent and understanding between DynCorp and Underwriters to exclude any coverage for liability arising out of the aerial spraying of chemicals under the INL Contract.[87]

First, when DynCorp added its INL Contract coverage to its preexisting aviation liability insurance, Policy No. 459232400, the slip stated "Liability excluding Chemical."[88] Thereafter, Endorsement No. 3 to Policy No. 459232400 provided the full wording for the INL Contract coverage: "This policy does not cover liability for Bodily Injury or Property Damage directly or indirectly caused by or in consequence of the use of chemicals, dusting powders, seeds, fertilisers and compounds."[89]

Second, the slip for the next policy period, Policy A6A1194, contained a

---

Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 2012 WL 1869416, at *13 (Del. Ch. May 16, 2012) (quoting *Cerberus*, 794 A.2d at 1152 n.40 ("Reformation is available even when 'the antecedent expressions . . . [were] no more than a part of the contract that is in the preliminary process of being made.'"), *aff'd*, 68 A.3d 665 (Del. 2013)).

[87] Underwriters Resp. at 23.

[88] Underwriters Resp., Ex. 10 August 1, 1993 Slip.

[89] Endorsement No. 3.

provision "Excluding chemical liability."[90] Willis and Global Aerospace worked together to draft a policy based on this provision.[91] Willis proposed that the policy read:

> With respect to the IN[L] Contract, Global and Associates and/or East Inc. are added as additional Insureds. However, this Endorsement shall not apply in respect of liability for Bodily Injury or Property Damage caused directly by drifting compounds and/or seeds and/or pesticides dropped sprayed or emitted intentionally or otherwise.[92]

When Tony Towns, the deputy manager of the policy department for Global Aerospace, received the proposed policy wording, he responded to Willis stating that the "Endorsement [] does not relate correctly to the policy coverage . . . the second paragraph relates the restriction to the endorsement and not the coverage. The expiring policy endorsement for this extension . . . is much clearer."[93] Willis responded:

> The "drifting compounds/seeds etc." coverage only applies to the inclusion of Global Associates and/or East Inc as additional Insureds and it does only arise out of the IN[L] Contract, so there is no need to apply it as a policy exclusion.[94]

In his deposition, Mr. Towns testified that it was his understanding that the proposed draft wording "was designed to reflect the coverage agreed in paragraph

---

[90] Admitted Facts ¶ 32; Underwriters Resp., Ex. 19 Policy No. A6A1194 Slip.
[91] Underwriters Resp., Ex. 22 Deposition of Kevin Fletcher at 41 ("The job entailed looking at the agreed slip and taking the concise terms agreed on the slip and turning them into a fully claused policy.").
[92] Underwriters Resp., Ex. 21 Policy No. A6A1194 Draft Wording.
[93] Underwriters Resp., Ex. 25 September 26, 1994 Letter from Global Aerospace to Willis.
[94] Underwriters Resp., Ex. 26 October 6, 1994 Letter from Willis to Global Aerospace.

33 [Excluding chemical liability] on the slip"[95] and that "[it] appropriately expressed the agreed intent to exclude any chemical liability coverage for risks associated with the INL spraying operations."[96]

Finally, Underwriters cite the deposition testimony of Gary Standing, one of DynCorp's brokers.[97] Mr. Standing testified that he "never sought [] chemical coverage" for DynCorp and that the intent of the Aerial Application Exclusion was "to exclude liability arising from drug eradication and the drifting of compounds used to eradicate the crops."[98]

Based on the summary judgment record there are genuine issues of material fact in dispute and "the matter depends to [a] material extent upon a determination of credibility."[99] Therefore, construing the summary judgment record in the light most favorable to Underwriters, Underwriters have proffered evidence that "would support a finding by any rational trier of fact that each of the elements of reformation has been established by clear and convincing evidence."[100] Therefore, summary judgment is inappropriate.

---

[95] Underwriters Resp., Ex. 23 Deposition of Tony Towns at 55:4–56:17.
[96] *Id.*
[97] Underwriters Resp. at 24–26 (citing Ex. 15 Deposition of Gary Standing).
[98] Underwriters Resp., Ex. 15 Deposition of Gary Standing at 122:17–124:20.
[99] *Cerberus*, 794 A.2d at 1149–51.
[100] *CC Fin. LLC v. Wireless Properties, LLC*, 2012 WL 4862337, at *7 (Del. Ch. Oct. 1, 2012); *Cerberus*, 794 A.2d at 1149 ("Accordingly, we hold that the trial court must determine whether the plaintiffs on the summary judgment record proffered evidence from which any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence.")

3. DynCorp's "Irreconcilable Conflict" Argument

DynCorp also argues that Underwriters' reformation claim must fail as a matter of law because it would "create an irreconcilable conflict in the 1998–2003 Policies" because a policy wide Aerial Application Exclusion would conflict with the "already interpreted" Declared Spraying Provision.[101]

In the Duty to Defend Order, the Superior Court found that the exclusion for Aerial Application Exclusion applied to DynCorp's Additional Insureds, but not to DynCorp. This conclusion was based on the Court's determination that Underwriters' interpretation could not be reconciled with the plain meaning of the Aerial Application Exclusion as it relates to the Declared Spraying Provision.[102] However, the Court's analysis was based on the provisions of the Policies *as written*, construing the Policies as a whole. If Underwriters prove their reformation claims and the Policies are reformed, the Policies will be different,[103] and the Superior Court's analysis (in its Duty to Defend Order) of the plain meaning of the Polices would no longer apply. At this stage, the Court finds no irreconcilable conflict barring Underwriters' reformation claims.

---

[101] DynCorp Mot. Summ. J. at 22–25.
[102] *DynCorp*, 2009 WL 3764971, at * 5.
[103] *Colvocoresses v. W. S. Wasserman Co.*, 28 A.2d 588, 589 (Del. Ch. 1942) ("The very purpose of reformation by a Court of Equity is to make an erroneous instrument express correctly the real agreement between the parties.").

B. DynCorp's Alternative Motion for Partial Summary Judgment

Alternatively, DynCorp argues that Underwriters' proposed reformation language would not preclude Underwriters' duty to defend the Underlying Actions because the surviving IIED claims in the Underlying Actions remain potentially covered as "Bodily Injuries" under the Policies.[104] DynCorp maintains that the surviving IIED claims would not be excluded under a reformed Aerial Application Exclusion because the basis for the IIED claims is the alleged "extreme and outrageous conduct" of DynCorp's pilots in conducting the spraying operations.[105] DynCorp argues that inanimate objects like drifting compounds "cannot do outrageous things," and therefore, the *Arias* plaintiffs' IIED claims would not fall into an exclusion for liability "caused directly or indirectly by drifting compounds or seeds or pesticides."[106]

In response, Underwriters argue that DynCorp is judicially estopped from arguing that Underwriters would have a continuing duty to defend the Underlying Actions in the event that the Polices are reformed. Judicial estoppel "is an equitable doctrine designed to protect the integrity of the judicial process by 'prohibiting parties from deliberately changing positions according to the

---

[104] The Policies define "Bodily Injury" to include "mental anguish." DynCorp Mot. Summ. J. at 27; DynCorp Mot. Summ. J. Ex. 13 Policy ACA1194; DynCorp Mot. Summ. J., Ex. 24 Policy AFA1194.
[105] DynCorp Mot. Summ. J. at 29–31.
[106] *Id.*

exigencies of the moment.'"[107] It prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that a court was persuaded to accept as the basis for its ruling.[108]

During oral argument on Underwriters' duty to defend in the Superior Court Action, DynCorp argued that coverage for "liability arising out of spraying operations" was excluded from the Policies for the Additional Named Insureds, but not for DynCorp.[109] In support of this argument, Dyncorp stated:

> [T]his is a key to the whole "is there coverage for contamination" point in this case because [the Aerial Application Exclusion] shows that [Underwriters] knew how to exclude coverage for liability arising out of spraying . . . if they wanted to exclude coverage for the plaintiffs here [DynCorp], all they had to do was use that language and apply it to all of the policy.[110]

However, whether the Aerial Application Exclusion, if applied to Dyncorp, would bar coverage for every claim in the Underlying Actions was not developed as an issue at that early stage in the litigation. Thus, Underwriters' contention that Dyncorp is now taking a contrary position on the duty to defend is insufficient to support a claim of judicial estoppel.

DynCorp is not judicially estopped from arguing Underwriters' duty to defend. However, if Underwriters fail to prove their reformation claims by clear

---

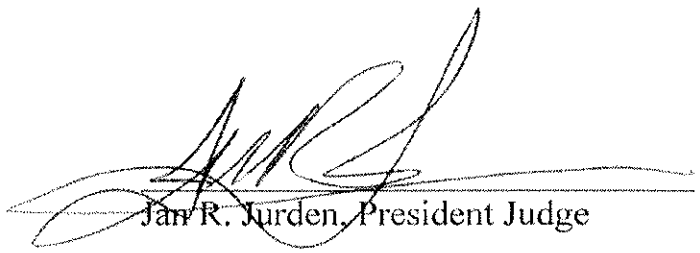
[107] *In re Silver Leaf, LLC*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001)).
[108] *Id.* (quoting *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. July 13, 1998)).
[109] Transcript of June 15, 2009 Hearing at 8:13–20 (Trans. ID. 26310029).
[110] *Id.* at 19:10–20:9.

and convincing evidence, the Policies will remain as written, and the parties' instant arguments on Underwriters' duty to defend will be moot. Therefore, until the Court renders its decision in the Reformation Action, DynCorp's Alternative Partial Motion for Summary Judgment is **DEFERRED**.

VI. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is **DENIED,** and Defendants' Alternative Motion for Partial Summary Judgment is **DEFERRED.**

IT IS SO ORDERED.



Jan R. Jurden, President Judge